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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-2357SI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARK A., as parent and next friend of ALLEAH A., a minor child,

Petitioner,

v.

GRANT WOOD AREA EDUCATION AGENCY, an Iowa School Corporation; IOWA CITY COMMUNITY SCHOOL DISTRICT, an Iowa School Corporation; and ROBERT D. BENTON, in his official capacity as Director, Iowa Department of Education,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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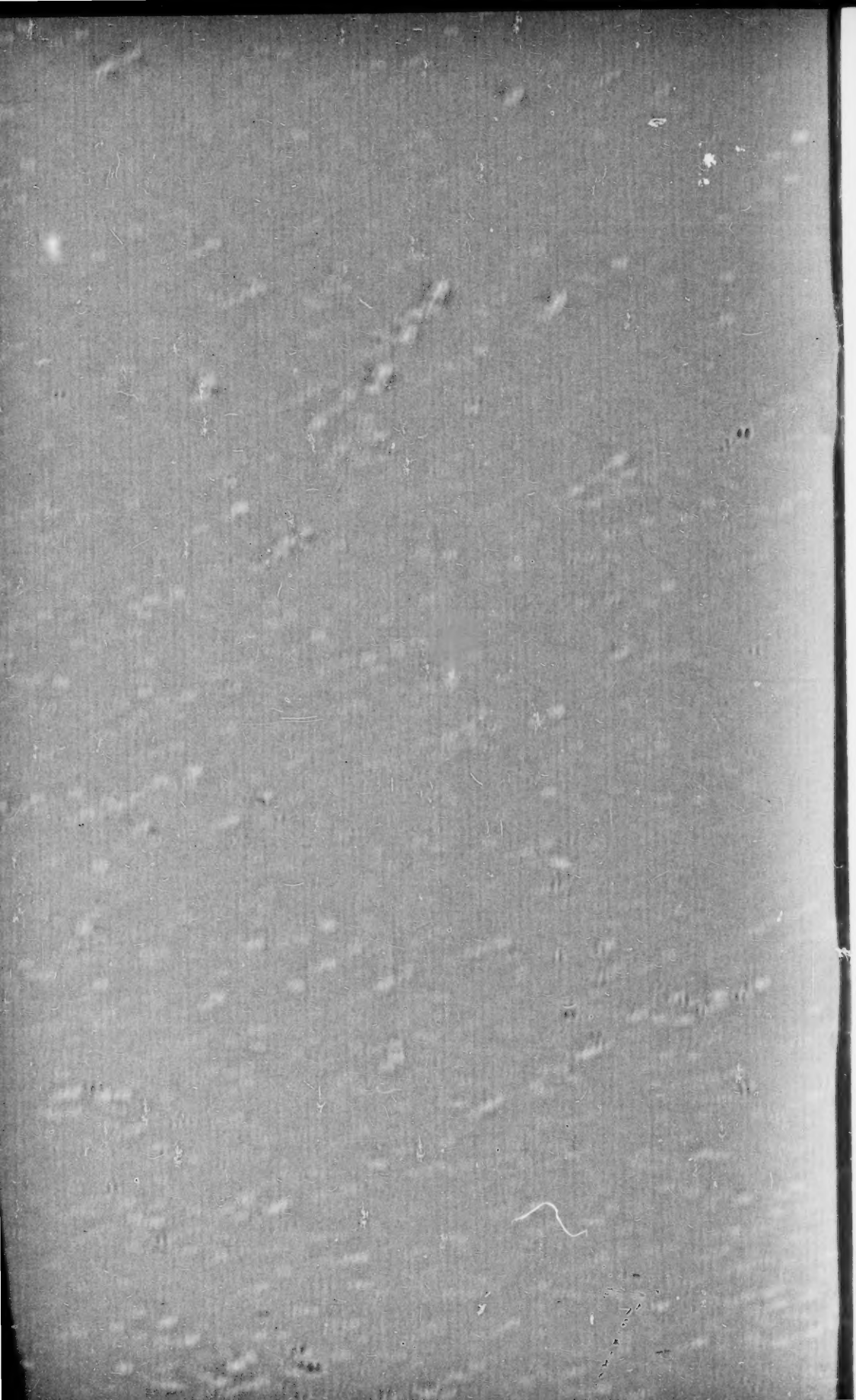

QUESTION PRESENTED

Whether a local education agency is required to place a handicapped preschool age child in a private school at state expense for the sole purpose of satisfying the mainstreaming goals of the Education For All Handicapped Children Act, 20 U.S.C. §1412(5)(b) (1982), when:

(1) A free appropriate public education is available;

(2) The child's individualized educational program is reasonably calculated to enable the child to receive educational benefits;

(3) The child's handicap is not unique;

(4) The child is placed in the least restrictive environment available under state law;

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STATUTES AND REGULATIONS

20 U.S.C. §1412(2)(B):

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

. . .

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with the State law or practice, or the order of any court, respecting public education within such age groups in the State;

Iowa Code §281.2 (1983):

1. "*Children requiring special education*" means persons under twenty-one years of age, including children under five years of age, who are handicapped in obtaining an education because of physical, mental, emotional, communication or learning disabilities or who are chronically disruptive,

as defined by the rules of the department of public instruction.

2. "*Special education*" means classroom, home, hospital, institutional, or other instruction designed to meet the needs of children requiring special education as defined in subsection 1; transportation and corrective and supporting services required to assist children requiring special education, as defined in subsection 1; in taking advantage of, or responding to, educational programs and opportunities, as defined by rules of the state board of public instruction.

It is the policy of this state to provide and to require school districts to make provision, as an integral part of public education, for special education opportunities sufficient to meet the needs and maximize the capabilities of children requiring special education. This chapter is not to be construed as encouraging separate facilities or segregated programs designed to meet the needs of children requiring special education when such children can benefit from all or part of the education program as offered by the local school district. To the maximum extent possible, children requiring special education shall attend regular classes and shall be educated with children who do not require special education. Whenever possible, hindrances to learning and to the normal functioning of children requiring special education within the regular school environment shall be overcome by the provision of special aids and services rather than by separate programs for those in need of special education. Special classes, separate schooling or other removal of children requiring special education from the regular educational environment, shall occur only when, and to the extent that the nature of severity of the educational handicap is such that

the education in regular classes, even with the use of supplementary aids and services, cannot be accomplished satisfactorily. For those children who cannot adapt to the regular educational or home living conditions, and who are attending facilities under chapters 263, 269 and 270, upon the request of the board of directors of an area education agency, the department of social services shall provide residential or detention facilities and the area education agency shall provide special education programs and services. The area education agencies shall co-operate with the board of regents to provide the services required by this Act.

Special aids and services shall be provided to children requiring special education who are less than five years of age if the aids and services will reasonably permit the child to enter the educational process or school environment when the child attains school age.

Every child requiring special education shall, if reasonably possible, receive a level of education commensurate with the level provided each child who does not require special education. The cost of providing such an education shall be paid as provided in section 273.9, this chapter and chapter 442. It shall be the primary responsibility of each school district to provide special education to children who reside in that district if the children requiring special education are properly identified, the educational program or services has been approved, the teacher or instructor has been certified, the number of children requiring special education needing that educational program or service is sufficient to make offering the program or service feasible, and the program or service cannot more economically and equably be obtained from the area education agency, another school district,

another group of school districts, a qualified private agency, or in co-operation with one or more other districts.

Any funds received by the school district of the child's residence for the child's education, derived from funds received through chapter 442, this chapter and section 273.9 shall be paid by the school district of the child's residence to the appropriate education agency, private agency, or other school district providing special education for the child pursuant to contractual arrangements as provided in section 273.3, subsections 5 and 7.

Iowa Code §299.1 (1983):

Attendance requirement. Any person having control of any child over seven and under sixteen years of age, in proper physical and mental condition to attend school, shall cause said child to attend some public school for at least twenty-four consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a later date, which date shall not be later than the first Monday in December.

The board may, by resolution, require attendance for the entire time when the schools are in session in any school year.

In lieu of such attendance such child may attend upon equivalent instruction by a certified teacher elsewhere.

34 C.F.R. §300.403(a) (1984):

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by

this part to pay for the child's education at the private school or facility....

670 I.A.C. §12.4(1) (1983):

In implementation of section 281.2 and these rules, children requiring special education shall attend regular class and receive services in a regular school to the maximum extent possible and appropriate. It is the policy of the department that school districts shall in co-operation with the area education agency, assemble sufficient numbers of children requiring special education in individual regular schools so that they may be efficiently served in conjunction with school programs for nonhandicapped pupils.

670 I.A.C. §12.19(8) (1983):

Placement of a preschool handicapped pupil in a licensed preschool program for nonhandicapped pupils may be made provided that:

a. The child is also enrolled in a home instruction or center-based program in addition to placement in a preschool for nonhandicapped children.

b. The pupil's special education needs are of a unique nature and cannot be met in other special programs for preschool handicapped pupils.

c. Appropriate special education support services are provided in accord with the pupil's needs.

d. The length of any single placement is for one academic year or less.

e. The director has approved the individualized educational plan and a procedure for ongoing evaluation.

f. The preschool teacher serving the handicapped child is appropriately certified by the Division of Teacher Education and Certification.

g. An appropriate special education consultant from the area education agency is assigned to each pupil to regularly monitor through twice a month site visits, the child's progress and performance.

No. 85-2357SI

IN THE
SUPREME COURT OF
THE UNITED STATES
October Term, 1986

MARK A., as parent and
next friend of ALLEAH A.,
a minor child,
v. *Petitioners,*
GRANT WOOD AREA EDUCATION AGENCY,
an Iowa School Corporation;
IOWA CITY COMMUNITY SCHOOL DISTRICT,
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capacity as Director, Iowa Department
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ON WRIT OF CERTIORARI TO THE UNITED STATES
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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Alleah A. was less than three years old when this dispute arose. She is afflicted with a variety of handicapping conditions and her developmental age is approximately one-half of her chronological age.

Alleah began attending Handicare, Inc. in October 1981

when she was 13 months old. Handicare is a private nonprofit day-care center for both handicapped and nonhandicapped children from infancy through age six. Alleah was referred to Grant Wood Area Education Agency's Early Childhood Program during the fall of 1981 for testing and evaluation. The Early Childhood staff reviewed Alleah's needs at a staffing on February 4, 1982. Based on the staffing, Grant Wood Area Education Agency (Grant Wood) recommended that Alleah continue at Handicare for the remainder of the school year in addition to a home instruction program. Alleah's mother participated in the staffing and agreed to Alleah's placement in a special education program.

Placement recommendations are reviewed annually by Grant Wood, and on June 1, 1983, a second staffing was held to reevaluate Alleah's special education needs. The Early Childhood staff found that Alleah needed more time in a structured environment than she received at Handicare and in the home instruction program, concluding:

> Specific program needs were identified in all developmental areas. Alleah will require occupational and physical therapy, assistance with the developmental self-skills, particularly eating and dressing, effective methods of communication, development of cognitive skills, *all within an environment that is structured to facilitate the teaching of these skills.* It was agreed that it will be particularly important to make use of all sensory modalities when working with Alleah, particularly the use of her tactile skills. Adaptation of some instructional materials

> will be required and appropriate positioning will be important in facilitating learning. (emphasis added)

The staffing team recommended placement in a preschool development classroom (PDC) in a category of mental disability/physical disability. Preschool developmental classes are multi-categorical classes that serve handicapped children ages three to seven. The curriculum is developed to meet the unique needs of handicapped preschool age children based on their developmental level. Some of the children have a primary disability in one area which interferes with their learning of that skill but have adequate skills in other development areas. The PDC recommended for Alleah was located at a regular elementary school in the district. Transportation to and from school was to be provided at no expense to her parents.

Students in PDC are not integrated with pre-school age nonhandicapped children because the State of Iowa does not provide public preschool programs for nonhandicapped children. Therefore, there are no nonhandicapped preschool age children enrolled in public education programs. PDC students do have the opportunity to interact with kindergarten and first grade students outside of the classroom. The PDC program is the least restrictive program available within the public system.

Alleah's parents disagreed with the PDC recommendation and appealed the PDC placement to the Iowa Department of Public Instruction. They wanted Alleah placed at state expense in a private school which served both handicapped and nonhandicapped preschool age children in the same

classroom. An administrative hearing was held on May 15, 1984. The hearing officer found that the placement decision of the staffing team was appropriate for Alleah and denied the parents' request for placement in a private school at state expense.

Mark and Ruth A. then filed suit in the United States District Court for the Southern District of Iowa. The case was submitted to the court on a stipulated record. On October 25, 1985, the District Court affirmed the decision of the hearing officer.

Alleah's parents appealed to the Eighth Circuit. They argued that integration of handicapped children with nonhandicapped children in the same classroom was required regardless of age. At oral argument before the Eighth Circuit, counsel for Alleah conceded that Alleah's handicap was not unique and that if private placement were required for her, it would be required for all other handicapped children in the PDC program. The Eighth Circuit found that the Act did not "compel the state to establish entire new levels of public education services to satisfy the Act's mainstreaming requirements," and upheld the judgement of Iowa's educational authorities that Alleah could receive a free appropriate public education by placement in the PDC program at a public elementary school.

REASONS FOR DENYING THE WRIT

THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS OF APPEAL.

Petitioner argues that the Eighth Circuit's decision is in

direct conflict with the Sixth Circuit's decision in *Roncker v. Walter,* 700 F.2d 1058 (6th Cir. 1983) and is inconsistent with the Eighth Circuit's own holding in *Springdale School District #50 v. Grace,* 693 F.2d 41 (8th Cir. 1982). Petitioner's argument is without merit. The Eighth Circuit's ruling follows this Court's decision in *Board of Educ. v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034 (1982), as well as the guidelines established in *Roncker* and *Springdale.*

The Court in *Rowley* established a two step test for judicial review of suits brought pursuant to the Education for All Handicapped Children Act of 1975 (Act), 20 U.S.C. § 1401 *et seq.* First, the court must determine whether the state has complied with the procedures set forth in the Act. Second, the court must determine whether the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits. *Rowley,* 458 U.S. at 206-07, 102 S.Ct. at 3051. The Court also emphasized that handicapped students must be mainstreamed to the "maximum extent appropriate." *Rowley,* 458 U.S. at 181, 102 S.Ct. at 3038.

In the present case, the District Court and Eighth Circuit followed the procedures for review outlined in *Rowley.* Both found that Alleah could receive educational benefits in the PDC program. Further, both the District Court and Eighth Circuit found that PDC allowed Alleah to be mainstreamed to the maximum extent appropriate.

In *Roncker v. Walter,* 700 F.2d 1058 (6th Cir. 1983), plaintiff's son, Neill Roncker, was nine years old and severely mentally retarded. He required special instruction and could not be placed in educational classes with nonhandicapped

children. His evaluation, however, indicated that he would benefit from contact with nonhandicapped children. At issue was whether Neill should be placed in a special education program located in a county school exclusively for mentally retarded children or at a regular school where he would have some contact with nonhandicapped children.

The Sixth Circuit recognized that the Act required placement of handicapped children with nonhandicapped children to the maximum extent appropriate. The court stated that if there are two available public programs which could provide "educational benefits," then placement must be made in the least restrictive environment. The Sixth Circuit found the district court had utilized an improper standard of review and remanded with instructions to determine whether Neill's educational needs could be provided within a regular school rather than a segregated school. *Roncker v. Walter,* 700 F.2d at 1062.

In *Springdale School District #50 v. Grace,* 693 F.2d 41 (8th Cir. 1892), the school district recommended that Sherry Grace be placed in a segregated school for deaf children. Sherry's parents and the State Board of Education desired placement at a regular school with a certified teacher of the deaf. The hearing officer agreed with Sherry's parents and State Board. The issue before the Eighth Circuit was whether Sherry's individualized educational program was reasonably calculated to enable her to reach educational benefits.

The Eighth Circuit recognized that there were two available public programs which could provide educational benefits and found that the goal of mainstreaming was served by placing Sherry in the least restrictive environment available.

The court declined to reverse the judgment of the State's administrative decision makers that Sherry could receive a "free appropriate public education" at Springdale School. *Springdale*, 693 F.2d at 43.

Neither *Roncker* nor *Springdale* addressed placement issues involving private schools or preschool age students. Both cases involved a choice between two available public programs for school age children, one of which was more restrictive than the other. In the present case, the Eighth Circuit recognized that at issue is not a choice between two available programs, but petitioner's request for placement beyond the least restrictive environment within the public school system. The court properly held that the Act "does not compel the state to establish entire new levels of public education services to satisfy the Act's mainstreaming requirements." *Mark and Ruth A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986.)

THE HANDICAPPED CHILD IS RECEIVING A FREE APPROPRIATE PUBLIC EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT AVAILABLE

The Act requires states to provide a free appropriate public education for all handicapped children between the ages of three and twenty-one. 20 U.S.C. §1412(2)(B) (1982). The State of Iowa has elected to provide special education services to children under the age of three. *See* Iowa Code §281.2 (1983). Alleah, who was less than three years old when this dispute arose, was offered a free appropriate public education but her parents wanted her placed at a private school because they felt

Alleah would receive more contact with nonhandicapped preschool age children at the private school.

The Act does not mandate "mainstreaming" in the case of handicapped preschoolers when it would be inconsistent with state law. *See* 20 U.S.C. §1412(2)(B) (1982). Under Iowa law, handicapped children who need special education "attend regular classes and receive services in area schools to the maximum extent possible and appropriate." 670 I.A.C. §12.4(1). The State of Iowa does *not* provide public *preschool* programs for *nonhandicapped* children, but does require public preschool programs for *handicapped* children. *Compare* Iowa Code §299.1 *with* §281.2 (1983). Therefore, there are no area schools with nonhandicapped preschoolers. The only way school districts in Iowa could fully "mainstream" handicapped preschoolers would be to contract with private day-care centers for the sole purpose of mainstreaming. Such an extensive system of contracting is not required by the Act and would be inconsistent with state law under the circumstances of this case. Iowa administrative regulations preclude placement of handicapped preschoolers in a private school at state expense unless the pupil's "special education needs are of a unique nature and cannot be met in other special programs for preschool handicapped pupils". *See* I.A.C. §12.19(8)(b) (1983).

In the present case, petitioner did not contend at the administrative hearing that Alleah's special education needs were of a unique nature. Further, petitioner did not dispute that PDC could provide Alleah with educational benefits.

Petitioner misconstrues the mainstreaming goals and requirements of the Act as they relate to preschool age children. The Act does not require integration of preschool age

handicapped children with preschool age nonhandicapped children in the same classroom. According to the United States Department of Education and the Bureau of Education for the Handicapped, in the absence of public preschool programs, a local education agency may meet the mainstreaming goals of the Act by locating preschool handicapped programs in a regular elementary school building. (See Appendix A). Handicapped preschoolers are thus part of the regular public school system and are not relegated to a segregated facility.

In the present case, Alleah's parents had two options available. First, they could place their child in an appropriate program in the least restrictive environment available in the public school system. Second, they could enroll their child at a private day-care center at their own expense. Alleah's parents chose the latter option, and under such circumstances the school district and local education agency are not required to reimburse them for the private education of their child:

> "If a handicapped child has available a free *appropriate public* education and the parents choose to place the child in a *private* school or facility, the part to pay for the child's education at the private school or facility. . . ." (Emphasis added)

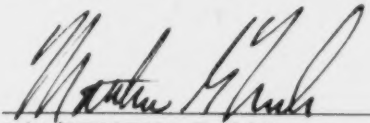
Burlington School Committee v. Dept. of Educ., _____ U.S. _____, 105 S.Ct. 1996, 2005 (1985), *citing* 34 C.F.R. §300.403(a) (1984).

CONCLUSION

Petitioner has failed to establish grounds for granting the writ of certiorari. The Eighth Circuit Court of Appeals did not decide the case in a way which conflicts with applicable

decisions of this Court or another federal court of appeals. The Eighth Circuit adequately analyzed the issues and facts and correctly interpreted state law. The petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Matthew G. Novak, attorney for respondents herein, and a member of the Bar of the Supreme Court of the United States*, hereby certify that I served true and correct copies of the foregoing Respondents' Brief in Opposition on Carroll L. Lucht, Civil Litigation Clinic, University of Iowa, College of Law, Iowa City, Iowa 52242.

Matthew G. Novak

*Application for membership pending

APPENDIX A

United States Department of Education
Policy Letter/November 19, 1984

Inquiry by:

Joan Turner Clary
Consultant, Preschool Handicapped
Iowa Department of Public Instruction
Grimes State Office Building
Des Moines, IA 50319

Digest of Inquiry
(October 4, 1984)

What is the SEP policy on the responsibility of school districts to integrate handicapped preschoolers into private preschools in a state where there is no public school program for nonhandicapped students under the age of five?

Text of Response
(November 19, 1984)

Thank you for your letter regarding the Iowa State Education Agency's responsibility for implementing the least restrictive environment (LRE) provisions (section 612(5)(B) of the Education of the Handicapped Act) for preschool handicapped children. The specific situation described in your letter is based on the fact that the State of Iowa mandates public preschool programs for handicapped children, but does not have public preschool programs for nonhandicapped children.

As you are aware, in the past the Department has taken the position that Part B of the Education of the Handicapped Act (EHA-B) and its accompanying regulations (34 CFR Part 300)

do not require a State educational agency (SEA) or local educational agency (LEA) to establish preschool programs for nonhandicapped children. Nor does the EHA-B require an SEA or LEA to enter into extensive contractual arrangements with private facilities for the sole purpose of implementing the LRE provisions. This policy, however, does not relieve a State of its statutory responsibility to implement the LRE provisions under 34 CFR 300.550 — 300.556 with regard to preschool handicapped children. In the absence of public preschool programs for nonhandicapped children, there are a number of ways an SEA or LEA could meet the LRE requirements, such as linking preschool handicapped programs to the preschool programs for nonhandicapped children operated by other public agencies (such as Head Start), or by locating preschool handicapped programs in regular elementary school buildings. This remains the current policy of the Department.

Although SEAs and LEAs have a certain amount of flexibility about the method of meeting the LRE requirements, they must ensure that each handicapped child's placement is based on the child's unique needs as specified in the individualized education program (IEP). *See* 34 CFR 300.552(a). The placement team must determine where the special education and related services contained in the IEP can be appropriately provided in the least restrictive environment.

We hope this information adequately addresses your concerns. Please do not hesitate to contact this Office if we can be of further assistance.

Wendy M. Cullar
Director, Special Education Programs

Bureau of Education for the Handicapped/
Policy Letters, 211:133

Inquiry by:

Harold Burke
Director of Special Education
Alexandria Public Schools
Lee Administrative Annex
1108 Jefferson Street
Alexandria, Virginia 22314

Digest of Response
(January 30, 1979)

Although preschool handicapped children receiving special service have the same rights as school-age handicapped children under Pub. L. 94-142, a district may not be required to set up programs for nonhandicapped preschoolers simply to provide a "Least Restrictive Environment" for the handicapped students. "Neither may districts be compelled to establish extensive contract programs with private schools which serve both handicapped and nonhandicapped children solely to implement the LRE principle"; the LRE requirement "must be met by an alternative means."

Where the State requires preschool education for handicapped students, a district may provide services for the handicapped preschoolers and still satisfy the "Least Restrictive Environment" requirement of Pub. L. 94-142 in several ways: e.g. linking the handicapped program with some other nonhandicapped preschooler program; or placing the handicapped preschooler program in a regular school with school-age nonhandicapped students.

Text of Response
(January 30, 1979)

This is in reply to your letter to Mr. Bill Tyrrell in which you asked for clarification of the least restrictive environment (LRE) provision at the preschool level under Part B of the EHA, as amended by P.L. 94-142. Please accept our apology for the long delay in responding in writing to your request. (I believe, however, that Mr. Bill Tyrrell and Dr. Jerry Vlasak both talked with you on several occasions about your letter.)

The main question raised in your letter was: must the LRE provision be implemented at the preschool level when there is a mandate to serve handicapped children but no requirement to educate nonhandicapped preschoolers. More specifically, you asked: If a local educational agency (LEA) does not provide public school programs for nonhandicapped preschoolers, must the LEA enroll handicapped children in private programs in order to comply with the LRE requirement?

First, each State must insure that a free appropriate public education is available to all handicapped children within the State-mandated age ranges and Federal timelines specified by Section 612(2)(b) of EHA, Part B. When preschool handicapped children are served, they must be provided all rights and benefits accorded under the Act and its implementing regulations (Section 121a.300(b)(4)). The special education and related services provided to such children must be based on an individualized education program (IEP) designed to meet each child's unique needs.

Second, under Part B regulations, each public agency must insure (1) that to the maximum extent appropriate,

handicapped children are educated with nonhandicapped children, and (2) that they are only placed in special classes or separate schools when necessary for their individual needs. (See Sections 121a.550 to 121a.556). This provision applies to preschool as well as school-aged handicapped children.

The LRE provision applies to all handicapped children receiving free appropriate public education. However, the Bureau does not interpret the provision as requiring LEAs that have no preschool programs for nonhandicapped children to establish programs for those children *for the sole purpose* of being able to implement the LRE principle for handicapped children. Similarly, it is not the intent of this provision to compel LEAs to establish extensive contract programs with private schools which serve both handicapped and nonhandicapped children solely to implement the LRE principle.

In jurisdictions where there are no LEA programs for nonhandicapped preschoolers, the LRE requirements must be met by an alternative means. The LEA responsible for the education of handicapped children must carefully determine whether there are any preschool programs serving nonhandicapped children to which the program for handicapped children may linked on even a part-time basis (Head Start, for example). Further, the LEA must consider whether the program may be located in a regular school setting serving nonhandicapped school-age children. Placement decisions must be made on an individual basis in accordance with each child's IEP. Generally, the use of facilities which are separate or otherwise solely devoted to the handicapped is permissible only when necessary to meet an individual preschool child's specific needs.

I sincerely hope that this letter satisfactorily responds to the questions and concerns you raised. If our office can be of further assistance, please let us know.

Thomas B. Irvin, Chief
State Policy and Administrative
Review Branch, DAS
Bureau of Education for the
Handicapped